

After reviewing the preliminary hearing record, the Appeals Board finds as follows:

The Appeals Board has jurisdiction to review a preliminary hearing order when a party questions whether claimant's accidental injury arose out of and in the course of his employment. See K.S.A. 1996 Supp. 44-534a.

(1) Claimant claims he injured his low back while performing work activities for the respondent from October 1, 1996, until his last day worked on January 7, 1997. Claimant also claims a left knee injury resulting from a fall caused by a weak leg. Claimant testified he first noticed a burning sensation in his lower back as he was working sometime around October 1, 1996. Claimant further testified he notified his supervisor, Kathy, the day following this incident.

The respondent terminated claimant for reasons not related to his alleged injuries on January 7, 1997. A few days following the termination on January 14, 1997, claimant sought medical treatment for his low back and left knee injuries from orthopedic surgeon John G. Yost, Jr., M.D. Dr. Yost's examination notes were entered into evidence by the claimant at the preliminary hearing. The doctor's assessment of his examination of claimant was lumbosacral sprain with disk herniation and lumbar radiculopathy and left knee torn medial meniscus secondary to a fall on claimant's weak leg. Dr. Yost indicated claimant could not work and recommended an MRI study to verify his assessment of disk herniation and torn meniscus. Claimant gave Dr. Yost a history of no previous injury to either his back or knee. Claimant also testified that his only previous injury to his back was in 1972 and he had a work-related left knee injury approximately five years ago.

Under cross-examination, claimant denied telling Dr. Yost that he had no previous injuries to either his back or knee. Claimant admitted he had made application for unemployment benefits indicating that he was physically able to work and he was presently being paid those benefits. Claimant made no request to the respondent for medical treatment while he was working for the respondent. Medical records were produced by the respondent and entered into evidence at the preliminary hearing that showed claimant had a previous workers compensation claim for an injury which included his back that occurred in June 1987. Other medical records produced indicated that claimant had a workers compensation claim for injuries to his low back, left knee, and shoulders that occurred in February 1993.

The respondent's owner, Given M. Steinbauer, testified at the preliminary hearing. Mr. Steinbauer established that he and the claimant worked together the complete work day on December 13, 1996. During that day, Mr. Steinbauer testified the claimant never complained of any type of problem with either his back or knee. Claimant also did not request, during his employment, the respondent to furnish medical treatment for his alleged work-related injuries.

The Administrative Law Judge denied claimant's request for medical treatment and found there was no request for temporary total disability compensation. However, the preliminary hearing transcript specifically indicates that the claimant requested temporary

total disability compensation to be paid from January 1, 1997. The Administrative Law Judge did not make a finding as to why he denied claimant's preliminary hearing requests either in the preliminary hearing transcript or in his Order. The claimant in his Application for Review raised the issue of whether claimant sustained an accidental injury while working for the respondent.

The Administrative Law Judge apparently denied claimant's request for preliminary benefits because he found the claimant not credible. Claimant did not request medical treatment for his alleged injuries until after he was terminated by the respondent for reasons not associated with the injuries. Claimant, following his termination, made application for unemployment benefits and stated that he was able to work. At the preliminary hearing, claimant argued he was unable to work and thus eligible for temporary total disability benefits. Claimant gave a history to Dr. Yost that he had no previous back or knee injuries, when in fact he had made previous workers compensation claims in the past for injuries to both his back and knee. The Appeals Board finds some deference should be given to the Administrative Law Judge's decision that denied claimant preliminary benefits as he had the opportunity to personally observe the witnesses who testified. Thus, the Administrative Law Judge was in the best position to assess the witnesses' credibility. The Appeals Board finds the claimant failed to prove that it is more probably true than not that his low back and left knee injuries arose out of and in the course of his employment with the respondent.

(2) This issue is rendered moot by the above findings.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered Administrative Law Judge Steven J. Howard on April 29, 1997, should be, and is hereby, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1997.

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BOARD MEMBER

c: Thomas E. Hayes, Pittsburgh, KS  
Matthew J. Stretz, Kansas City, MO  
Steven J. Howard, Administrative Law Judge  
Philip S. Harness, Director